STATE OF MICHIGAN

COURT OF APPEALS

CARLA MIA DONALD,

Plaintiff-Appellant,

v

WILLIAM SPURGEON DONALD,

Defendant-Appellee.

UNPUBLISHED
November 6, 2003

No. 244782
Genesee Circuit Court
LC No. 00-220629-DM

Before: Murphy, P.J., and Cooper and C. L. Levin*, JJ

LEVIN, J. (*dissenting*).

I respectfully dissent.

The trial court failed to make the requisite finding of changed circumstances or proper cause warranting change of custody, and such finding, had there been one, would have been unsupported by the evidence.

I

That statute provides, in pertinent part:

> (1) If a child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child the court may do 1 or more of the following:
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> (c) Modify or amend its previous judgments or orders *for proper cause shown or because of change of circumstances* until the child reaches 18 years of age . . . . *The court shall not modify or amend its previous judgments or orders or issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child.* The custodial environment of a child is established if over an appreciable time the child naturally looks to the custodian in that environment for

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* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

> guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [Emphasis supplied.] MCL 722.27.

This Court, in *Rossow v Aranda*, 206 Mich App 456, 457; 522 NW2d 874 (1994), emphasized that the statute requires the trial court to find either changed circumstances or proper cause *before* considering whether a change in custody is in the child's best interests. The Court in *Rossow* rejected an argument that "the trier of fact erred as a matter of law in refusing to consider and make findings with regard to the statutory best interest factors." *Id.*, 457. The Court stated:

> The plain and ordinary language used in MCL 722.27(1)(c) evinces the Legislature's intent to condition a trial court's reconsideration of the statutory best interest factors on a determination by the court that the party seeking the change has demonstrated either a proper cause shown or a change of circumstances. It therefore follows as a corollary that where the party seeking to change custody has not carried the initial burden of establishing either proper cause or a change of circumstances, the trial court is not authorized by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors. [*Id.*, 457-458.]

Accordingly, a trial court, deciding a petition to change custody, must begin by making a threshold finding whether there are changed circumstances or proper cause for modifying the earlier custody order. If the trial court fails to so find, no further consideration of the best interests factors is warranted, and the petition must be denied. *Id.*

If there is sufficient evidence of changed circumstances or proper cause, the trial court must then determine whether there is an established custodial environment. If there is such an established custodial environment, the trial court must, applying the clear and convincing evidence standard, determine whether a change is in the child's best interests. MCL 722.27(1)(c); *Phillips v Jordan*, 241 Mich App 17, 21; 614 NW2d 183 (2000); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). On appeal, this Court reviews all findings of fact by the great weight of the evidence standard. *Id.*, 20.

II

The trial court here failed to make the requisite finding of changed circumstances or proper cause. The majority infers that the trial court adequately satisfied this requirement by "convey[ing] its concern that the child's special needs were not being met and that the parties were having extreme difficulty in communicating with each other regarding the child." (Slip op at 3.) The trial court did not, however, satisfy this essential requirement simply by expressing concern over educational and communication issues throughout its opinion without addressing why these matters constituted grounds for considering a change of custody.

The majority cites *Baker v Baker*, 411 Mich 567, 583; 309 NW2d 532 (1981), for the proposition that the trial court is not required to "comment upon every matter in evidence or

declare acceptance or rejection of every proposition argued." This statement should, however, be read in context. The *Baker* Court made this statement in regard to a trial court's "failure to speak to each of the myriad factors which could be characterized as community contacts" in a case where the parties presented copious evidence regarding the community contacts best interest factor. *Id.*, 582-583.

The *Baker* Court's statement cannot properly be read as a waiver of the most basic requirement that that the trial court make a threshold finding of changed circumstances or proper cause warranting a change of custody.

Additionally, the majority's inference is unwarranted because it is based on statements the trial court made in the course of making findings concerning the best interest factors. The trial court may not consider the best interest factors until *after* it has made the threshold finding of changed circumstances or proper cause. *Rossow, supra*, 457-458. Allowing the trial court to blend these findings circumvents both the statutory requirement of separate findings and the statutory prohibition against changing custody based on the best interest factors, absent proper cause or changed circumstances. *Id.*

This Court held in *Jack v Jack*, 239 Mich App 668, 670; 610 NW2d 231 (2000) that when a trial court fails to make a finding whether there is an established custodial environment (the second threshold issue in the MCL 722.27(1)(c) scheme), "this Court will remand the case for a finding unless there is sufficient information in the record for this Court to make its own determination of this issue by de novo review." *Id.*, quoting *Thames v Thames*, 191 Mich App 299, 304; 477 NW2d 496 (1991).

Applying this rule by analogy to an omission of a finding on changed circumstances or proper cause, it appears that de novo review of the record shows that an affirmative finding would be unsupported. The underlying premise of the trial court's decision was that defendant was better equipped than plaintiff to comprehend the child's special needs and provide him with suitable educational programs. The record evidence does not, however, show any difference in capability sufficient to establish changed circumstances or proper cause.

III

The parties' dispute over educational programs did not establish that plaintiff was incapable of appreciating and fulfilling the child's special needs.

A

The substance of defendant's evidence was that plaintiff opted to send the child to the Terry Matlock program instead of a Genesee Intermediate School District (GISD) preschool program at Cook Elementary, and that she moved to the Goodrich school district, where the child would attend a regular classroom kindergarten at Reid Elementary. The child would there receive special assistance from teacher's aides, while defendant thought the child should be in a special education classroom.

At most, this evidence demonstrates a difference in opinion over educational options, not any failure by plaintiff. The evidence established that plaintiff had the child evaluated at GISD,

and that she acknowledged that his low IQ and speech difficulties called for special treatment. Plaintiff was accused by Victoria Cox of "minimalizing" [sic] the child's deficits, and that she was evidently averse to the stigmas and labeling associated with developmental impairments. But the plaintiff did not deny that the child had problems or needed help, and she had planned and arranged for help from and at the Reid school. Moreover, as a parent, plaintiff was entitled to question diagnoses and seek alternative opinions.

The evidence does not establish that plaintiff made poor, inadequate, or irrational decisions regarding education. Though defendant did not like the Terry Matlock preschool program, he failed to show that the child's needs suffered there. Plaintiff articulated legitimate and plausible reasons for her decision, namely that the child performed well at Terry Matlock, and that he would likely imitate other children's adverse behaviors if he attended the Garden Center program at Cook. Defendant failed to show that these reasons were false or irrational.[1] On the contrary, defendant acknowledged that Garden Center intended to place the child in a classroom of children whose deficits were far worse than his because the appropriate class was full.

B

Defendant also failed to raise clear and convincing evidence that any disparity between the parties' proposed kindergarten programs constituted proper cause for a change in custody. On the contrary, although the trial court took little notice, defendant's position on the school issue, which was weak at the outset, collapsed during the defendant's second day of testimony.

At the outset of this case, defendant vigorously maintained that the child would be better off in his care because he would send him to Anderson Elementary School in the Grand Blanc district. Defendant and plaintiff previously agreed that the child would go to Anderson, but plaintiff later moved to the Goodrich District.

At trial, defendant opined that Anderson was an "exceptional" school, which specialized in special education. In his first day of testimony, defendant contended that Anderson was the best place for the child because they would implement the Individual Education Plan (IEP) recommended by GISD, and because he would be placed in a special education classroom with the goal of eventually mainstreaming him into a regular classroom.

Plaintiff testified that her proposed school, Reid Elementary in the Goodrich district, would start the child in a regular classroom. He would receive special assistance from teacher's aides, and teachers would monitor his progress to determine whether he should remain in the regular classroom or be placed in a special classroom.

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[1] Defendant's complaints about plaintiff's choices often appeared overstated. For example, his counsel mocked plaintiff's belief that Terry Matlock's tap dance activity was beneficial to the child. However, defendant planned to enroll the child in a karate class, because he believed this would help him develop motor skills.

Cox agreed with defendant that the Anderson approach was correct, and she sharply criticized plaintiff for sending the child to a school that would immediately place him in a regular classroom kindergarten. Defendant and his counsel also insinuated that plaintiff acted selfishly and irrationally by moving from the Grand Blanc district to the Goodrich district, despite plaintiff's testimony that she now had a larger home with more outdoor play space.

Thus, at the close of defendant's first day of testimony, a major component of defendant's custody claim was the purported superiority of Anderson over Reid.[2]

C

On the following day, however, defendant's Anderson argument collapsed. Defendant admitted that because he did not live in Grand Blanc, he could not enroll the child in Anderson. Defendant also admitted that he did not know much about Thompson Elementary, the Davison district school that the child would attend if defendant won custody. Consequently, there was no evidence regarding Thompson's programs for special needs children, and no basis for making a comparison to Reid.

Even if the parties' respective positions had remained fixed at the Anderson versus Reid stage, there would be insufficient support for the trial court's belief that defendant's supposed superior ability to meet the child's educational needs constituted proper cause for considering a change in custody. Defendant's evidence did not show anything more than a difference of opinion over the best approach. Although defendant clearly disapproved of Reid's program, he failed to demonstrate that it was deficient or inappropriate with any evidence other than his own or Victoria Cox's opinion. (Cox's area of expertise did not encompass the education of mentally disabled children.) The fact that plaintiff's local school opted for regular placement with special assistance and monitoring is not concrete evidence to substantiate the trial court's belief that plaintiff had not or would not appreciate and work toward the child's educational goals.

This point is moot, however, because defendant himself had to admit that Anderson was not available to him and that he did not know how his local school would place the child. Defendant was thus unable to draw any contrast at all between his school and plaintiff's school, and the controversy over schools became a nullity. Consequently, there is no ground for questioning plaintiff's custody on the basis of school superiority.

IV

The trial court's underlying premise that plaintiff lacked the capacity to meet the child's needs also was based on Victoria Cox's expert testimony. The trial court was strongly influenced by Cox's evaluation of the parties; indeed, it seems that Cox's testimony might have determined the outcome.

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[2] The school issue was so crucial that the trial court postponed the child's enrollment pending resolution of the dispute although the school year was about to begin.

I recognize, of course, that this Court generally defers to a trial court's weighing of evidence and evaluation of a witness' credibility. *Fletcher v Fletcher*, 229 Mich App 19, 28; 581 NW2d 11 (1998). In the present case, however, Cox's opinion cannot reasonably serve as a basis for changing custody. Although Cox found that plaintiff scored low on parenting effectiveness assessments, Cox's findings are not evidence of either changed circumstances or proper cause for change of custody. There is no evidence that Cox discovered any attributes of plaintiff that did not exist when the original custody order was issued; thus, Cox's evaluation does not evidence changed circumstances.

Cox's evaluation was essentially a set of predictions of future behavior. Based on her assessment tools, Cox predicted that plaintiff would fail to recognize the child's needs and put them before her own. This prediction is not, however, corroborated by anything plaintiff actually did or did not do. For example, Cox forecast that plaintiff could have difficulty assessing her son's special needs, and in implementing and following through with goals for him. As discussed above, there is, however, no evidence that plaintiff has been negligent or irrational in her educational decisions.

Cox found that plaintiff was uncooperative and prone to believe that defendant and others were out to get her. Cox's findings of paranoia must however, be viewed in their appropriate context: defendant was, after all, fighting plaintiff for custody of their son. Moreover, Cox's contemptuous attitude toward plaintiff is apparent from reading the transcript. For example, Cox all but recommended termination of plaintiff's parental rights by opining that the child should not be placed with plaintiff even if defendant were not available to take custody. It is therefore not surprising that plaintiff would be evasive and defensive when dealing with Cox.

It appears that Cox's evaluation was not so much an appraisal of plaintiff's parenting abilities as it was an appraisal of her ability to handle an emotionally-charged, acrimonious proceeding over her son's future with finesse and equanimity.

V

The trial court's findings of fact are peppered with references to plaintiff's paranoia, her agitation during cross-examination, her belief that defendant was trying to "control" her, and her police reports. The trial court's fundamental obligation, however, was to determine whether there were changed circumstances or proper cause to disrupt its previous order. (See *Koron v Melendy*, 207 Mich App 188, 191; 523 NW2d 870 (1994), holding that a court's acceptance of the parties' custody agreement implicitly determines that the arrangement agreed to is in the child's best interest.) The trial court did not focus on this question. Instead, it engaged in an assessment of plaintiff's personality and emotional condition without addressing whether these matters actually impacted her ability to continue caring for the child to the extent that it should consider changing custody.

VI

Because the court failed to make the requisite preliminary findings, and there is no concrete evidence in the record of parental deficiencies on plaintiff's part, I would reverse on the ground that the court failed to make, and the evidence would not support, a finding of either

changed circumstances or proper cause for change of custody. I would remand for further proceedings consistent with this opinion.

/s/ Charles L. Levin